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Supreme Court, U.S.
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No. 10-1072

In The

SUPREME COURT OF THE UNITED STATES

ATP OIL & GAS CORPORATION

Petitioner,

vs.

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE, NOW KNOWN AS BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT ("BOEM"); KEN SALAZAR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR; MICHAEL R. BROMWICH, DIRECTOR OF BOEM; LARS T. HERBST, REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION, BOEM

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 29.6 STATEMENT

The Plaintiff – Appellant in the proceedings before the United States Court of Appeals for the Fifth Circuit was ATP Oil & Gas Corporation ("ATP"). ATP states that it has no parent company and that, for purposes of this disclosure, ATP is considered to be its own parent company, and no publicly held entity holds ten percent or more of its stock.

Defendants – Appellees were the United States Department of the Interior, Minerals Management Service, now known as Bureau of Ocean Energy Management, Regulation and Enforcement; Ken Salazar, Secretary of the Department of the Interior; Michael R. Bromwich, Director of the Bureau of Ocean Energy Management, Regulation and Enforcement; Lars T. Herbst, Regional Director of the Gulf of Mexico OCS Region, Bureau of Ocean Energy Management, Regulation and Enforcement.

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to here as the "Lack-of-Rig NTL" 4, 5, 7

I. PETITION FOR REHEARING

A. Summary.

Since the time that ATP filed its Petition for Writ of Certiorari and, notably, since this Court issued its denial, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEM") has come forward with an announcement of a breathtaking expansion of the scope of its regulatory power and the universe of entities that will be subject to this regulatory power. Specifically, on May 2, 2011, BOEM announced that it was expanding its regulatory powers beyond OCS lessees (and their designated operators) to extend to all contractors providing oilfield services on federal OCS leases. Supp. App. 1a. It is an expansion, by many factors, of the number of companies and individuals covered by BOEM's regulatory authority. As a direct result, BOEM's announcement significantly expands the impact of its failure to comply with the Administrative Procedure Act ("APA") (5 U.S.C. §500 *et seq*,) in its use and misuse of NTLs in regulating the federal offshore lands. Thus, this announcement by BOEM makes more imperative the need for this Court's scrutiny of the administrative vehicle known as the "Notice to Lessees" or "NTL" and justifies a rehearing of the denial of ATP's Petition.

As fully set out in ATP's Petition, this case presents two important issues of first impression for this Court concerning the standards for final administrative agency review of a subordinate agency decision, in this case the denial of ATP's

request for a lease extension by Defendant Interior's sub-agency, BOEM. The underlying arbitrary and capricious actions of Defendant Interior, including BOEM, were fundamentally predicated on their improper use, after its implementation, of the NTL administrative vehicle to implement BOEM's substantive policy governing such lease extensions.

Even though BOEM's enacting regulation specifies that NTLs are to be used for limited informational and interpretive purposes, BOEM uses this vehicle indiscriminately and predominantly to establish substantive regulations and rules for operations throughout the Gulf of Mexico as well as other OCS lands. ATP's Petition provides this Court with its first review of this extensively used administrative vehicle and the inherent misuse it is susceptible to, as was done in the current case.

B. BOEM's announced expansion of its regulatory power justifies, more than ever, this Court's first scrutiny of BOEM's use of NTLs to regulate the Gulf.

1. BOEM's recent announcement vastly expands the potential effect of its errors that arise in the present case.

On May 2, 2011, without Congressional authorization and outside of rulemaking of any sort, BOEM made the far-reaching announcement that it will now sweep under its administrative rules an entirely new segment of the oil industry, that is, the oil field service companies. Supp. App. 1a. These oilfield services companies run the full spectrum of

services, from the largest of offshore drilling companies to the smallest of crew-boat operators. This expansion, as openly intended by BOEM, increases by many factors the entities and activities to be put under BOEM regulation. Notably, in the same speech, BOEM also announced a vast expansion of the scope of its substantive regulations.

ATP's Petition presented this Court with its first opportunity to look into BOEM's improper, unrestrained reliance on NTLs for substantive regulations and to correct its arbitrary and capricious misuse of the NTL in the present case, with the attendant potential misuse in the future. BOEM's recent and intervening announcement makes the need for this scrutiny more imperative because an entirely new segment of the offshore industry will be exposed to the shortcomings and resulting harms caused by BOEM's unrestrained reliance on the NTL when administering the OCSLA lands in the Gulf of Mexico.

This appeal presents a case study of an agency, the Department of the Interior, that refused to engage in meaningful compliance with its obligations under the APA to fairly and independently scrutinize what, by any measure, was a simple, but plain error by frontline administrative personnel. Instead, Interior engaged in concerted action to rationalize the subordinate agency's error that effectively denied ATP's rights to have this error reviewed and corrected under the APA. The announced expansion of BOEM's regulatory reach will unavoidably expand the already enormous stakes put into play by BOEM's challenge to the integrity of the administrative process by its

unrestrained use of NTLs, as it did in the present case.

2. The Lack-of-Rig NTL was, like most NTLs, a substantive action that was implemented in the form of a vague and imprecise policy statement.

As fully set out in its Petition, when ATP submitted its request for a lease extension on July 25, 2006, BOEM had implemented a temporary policy that liberalized the granting of such lease extensions (called a Suspension of Operations or "SOO" under BOEM regulations) in light of a worldwide shortage of drilling rigs, which was exacerbated in the Gulf of Mexico by the extensive damage caused by Hurricanes Katrina and Rita. BOEM had issued the policy on February 10, 2006 in the form of an NTL, that is, Notice to Lessees NTL No. 2006-G02, referred to here as the "Lack-of-Rig NTL." App. 75a-78a. The Lack-of-Rig NTL consisted of two distinct portions: (1) a section setting forth the temporary policy being implemented, including its three express requirements; and (2) a preamble discussing the pre-existing policy for granting SOO extensions as a comparative backdrop for the purpose and scope of the temporary policy. *Id.* The change implemented by the Lack-of-Rig NTL was a sharp, substantive break from the pre-existing regime. App. 77a.

BOEM's enacting regulation specifies that NTLs are to be used for limited informational and interpretive purposes. 30 C.F.R. §250.103. While NTLs may be an effective tool for BOEM's

administration of this crucial industry when drafted and implemented properly for the true purpose of interpretive guidance and when applied consistently, the present case highlights the inherent shortcomings of the NTL format. This format allows, in fact is premised on, an unstructured lengthy narrative that has no safeguards to ensure enforceable clarity. Therefore, it is susceptible to and invites *post hoc* variances, inconsistencies and revisionist interpretations in actual application.

The Lack-of-Rig NTL is the proto-typical example of the shortcomings of this format. It was issued in a multi-page narrative format that buried its short and only truly operative section (that is, the section containing the three requirements for an SOO under the new Lack-of-Rig policy) on a portion of the second page. App. 77a. This operative section was preceded by a lengthy preamble reiterating the pre-existing policy. App. 75a-77a. Thus, the major portion of the Lack-of-Rig NTL was verbiage not related to the requirements for a lease extension under the new policy and, therefore, was not only unnecessary, but open to ambiguity and confusion.

In addition to allowing unnecessary and confusing language, NTLs are issued unilaterally by BOEM, without input from and dialogue with anyone outside the agency, therefore excluding experts, interested parties and stakeholders whether within or outside the industry. As a direct result, NTLs inherently lack the distilling and corrective benefits of notice and comment rulemaking that provides input from sources outside the agency itself. This Court has previously recognized the required benefit and fairness of the notice and comment

process "to assure fairness and mature consideration of rules of general application." *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Defendant Interior itself has long recognized the importance of public participation in rulemaking. Yet, without public input and comment, NTLs have no process for review and input by outside sources that could ensure the requisite clarity and accountability that could prevent subsequent arbitrary and capricious re-interpretation and inconsistent application of NTL-implemented policies.

This Court has never examined BOEM's extensive use of NTLs to regulate the critical offshore oil industry and, therefore, has never examined the inherent shortcomings of NTLs that allow the agency to avoid lawful accountability for its actions. Nor has this Court scrutinized the lack of clarity among Circuits as to the standards to which an agency should be held in promulgating substantive NTLs, in applying them fairly and consistently, and in promulgating changes to them.

The administrative record in this appeal, the IBLA Decision and the orders of the courts below present a case study of how BOEM, through the vagueness and indeterminacy of the NTL, was unimpeded in its refusal to follow the policy in its own NTL and how the lack of consistent judicial standards for the use of such documents allowed the BOEM to shield itself from accountability under APA standards of review.

3. The Defendants exploited the vague nature of the NTL to avoid effective judicial review of their failure to apply their own policy.

As ATP's Petition shows, the Lack-of-Rig NTL included an extensive discussion of the pre-existing regime that was being modified by the NTL's new policy. There is no reason to revisit the undeniable fact that, putting aside its arguments asserted on appeal, BOEM's Denial was nothing but an erroneous application of the pre-existing regime to ATP's request, as if the new policy never existed. After all, the Denial itself quoted from the preamble section of the Lack-of-Rig NTL as its only justification for refusing ATP's request, which rationale was simply reiterated by the IBLA in upholding the BOEM's Denial. Thus, this fundamental error by both Defendants arose directly from the rambling and undisciplined narrative form of the NTL, a narrative that allowed them and the reviewing courts to cite the policy that was being replaced as support for their rejection of ATP's request under the new policy.

Such an inherent shortcoming of the NTL format will allow, if not invite the kind of error as occurred here, where the regulated entity relies on a good faith and reasonable reading of the narrative, which the agency is later able to simply ignore by exploiting the vagueness of the NTL to fabricate new rationalizations for its error. In the present case, the record shows that the Defendants created, *post hoc*, entirely new requirements and application procedures for the Lack-of-Rig policy which openly

violated the *Chenery* and *Whole Record Doctrines*. In each instance, the Court of Appeals for the Fifth Circuit afforded the Defendant Interior improper latitude to recast its own policy in a manner that arose from inadequacies and shortcomings of the NTL vehicle that had been used for the substantive regulation by BOEM.

II. CONCLUSION

For these reasons, Petitioner ATP respectfully requests that this Court rehear its denial of and grant ATP's Petition for Writ of Certiorari.

Respectfully submitted on this 13th day of May, 2011.

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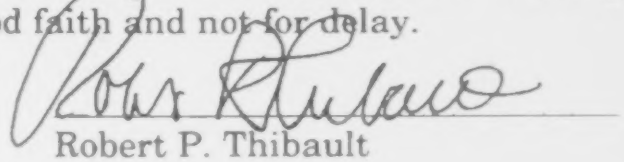
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CERTIFICATE PURSUANT TO SUPREME COURT RULE 44.2.

The undersigned counsel certifies that the grounds for this Petition for Rehearing of the Denial of ATP's Petition for Writ of Certiorari are limited to intervening circumstances of a substantial effect occurring after the filing of the Petition and is being presented in good faith and not for delay.



Robert P. Thibault

THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT

Office of Public Affairs

THE NEWS ROOM

FOR RELEASE:
May 02, 2011

BOEMRE Director Discusses the Future of Offshore Oil and Gas Development in the U.S. at Offshore Technology Conference

Houston, Texas – Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) Director Michael R. Bromwich delivered remarks today at the 2011 Offshore Technology Conference (OTC) in Houston, Texas.

. . .

Director Bromwich discussed the path forward for United States (U.S.) regulation of offshore oil and gas development, outlining the new offshore organizational and regulatory framework.

. . .

Good afternoon. I want to thank the conference organizers for putting together such an impressive event and for inviting me to speak about the future of offshore oil and gas development in the United States.

. . .

And today, I'd like to also announce two new major developments relating to the way we provide

information to and regulate entities that operate offshore:

. . .

Second, I have mentioned several times in recent weeks my interest in exercising regulatory authority over not only offshore operators but contractors as well. It has struck me as inappropriate to limit our authority to operators if in fact we had legal authority that reached more broadly to the activities of all entities involved in developing offshore leases. We have completed our review of the issue and have concluded that in fact we have broad legal authority over all activities relating to offshore leases, whether it engaged in by lessees, operators, or contractors. We can exercise such authority as we deem appropriate.

. . .

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